

1 **GIBBS & BRUNS, L.L.P.**
2 Kathy D. Patrick (TX Bar No. 15581400)
3 Email: kpatrick@gibbs-bruns.com
4 Robert J. Madden (TX Bar No. 00784511)
5 Email: rmadden@gibbs-bruns.com
6 Scott A. Humphries (TX Bar No. 00796800)
7 Email: shumphries@gibbs-bruns.com
8 1100 Louisiana, Suite 5300
9 Houston, Texas 77002
10 Telephone: (713) 650-8805
11 Facsimile: (713) 750-0903
12 Counsel for Plaintiffs

13 **COHEN KENNEDY DOWD & QUIGLEY, P.C.**
14 Ronald Jay Cohen (003041)
15 Email: rcohen@ckdqlaw.com
16 Daniel P. Quigley (009809)
17 Email: dquigley@ckdqlaw.com
18 The Camelback Esplanade I
19 2425 East Camelback Road, Suite 1100
20 Phoenix, Arizona 85016
21 Telephone: (602) 252-8400
22 Facsimile: (602) 252-5339
23 Local Counsel for Plaintiffs

24 **IN THE UNITED STATES DISTRICT COURT**
25 **FOR THE DISTRICT OF ARIZONA**

26 City of Chandler, et al.,) No: 2:03-cv-1220-PHX-ROS
27 Plaintiffs,) No: 2:03-cv-03-1618-PHX-FJM
28 v.) No: 2:03-cv-03-2084-PHX-PGR
29 Bank One, N.A., a national banking association,)
30 et al.,)
31 Defendants.)
32 _____)
33 State of Arizona, et al.,)
34 Plaintiffs,)
35 v.)
36 Credit Suisse First Boston Corp., a Delaware)
37 corporation, et al.,)
38 Defendants.)

39 **PLAINTIFFS' MOTION TO**
40 **TRANSFER AND CONSOLIDATE**

41 (Assigned to the Hon. Roslyn O. Silver)

1 Crown Cork & Seal Company, Inc. Master)
2 Retirement Trust, et al.,)
3 Plaintiffs,)
4 v.)
5 Credit Suisse First Boston Corp., a Delaware)
6 corporation, et al.,)
7 Defendants.)
8

9 Three cases, arising out of the same facts, with the same defendants, and the same
10 counsel, have recently been returned to the United States District Court for the District of
11 Arizona (the “District of Arizona”) by the Judicial Panel on Multidistrict Litigation. By this
12 motion, the plaintiffs in each of these cases (all represented by the same counsel) ask the
13 Court to transfer them to this Court, and consolidate them for trial pursuant to Federal Rule
14 of Civil Procedure 42(a) and Local Rule 42.1(a) and (b).

15 This motion has been filed with this Court because the above captioned case has the
16 lowest case number. *See* LRCiv 42.1(a) and (b). The two related actions that are the subject
17 of this motion are: No. 2:03-cv-03-1618-PHX-FJM, *State of Arizona, et al. v. Credit Suisse First*
18 *Boston Corp., et al.*, (the “State of Arizona Action”) and No. 2:03-cv-03-2084-PHX-PGR, *Crown*
19 *Cork & Seal Company, Inc. Master Retirement Trust, et al. v. Credit Suisse First Boston Corp., et al.*,
20 (the “Crown Cork Action”). A proposed form of order is attached.

21 **1. FACTUAL BACKGROUND.**

22 All three cases that are the subject of this motion arise out of a massive fraud
23 perpetrated on the State of Arizona, and numerous private plaintiffs, in connection with the
24 sale of asset backed notes issued by National Century Financial Enterprises, Inc. (“NCFE”)
25 and sold by Credit Suisse Securities (USA), LLC (“Credit Suisse”).

26 From 1996 to 2002, billions of dollars of triple-A rated NCFE notes were sold to
27 investors on the basis of representations that the notes were backed by high quality medical
28 accounts receivable and substantial reserve funds that would ensure their timely repayment.

1 These representations were false. The funds raised from investors were not used, as
2 represented, to purchase high quality medical accounts receivable and fund reserve accounts,
3 but instead were used by the founders of NCFE to acquire and fund the operations of failing
4 healthcare providers. When the fraud was finally revealed in late 2002, investors were left
5 holding billions of dollars of nearly worthless NCFE notes. Numerous criminal convictions
6 have resulted from this fraud.
7

8 The injured investors, which are plaintiffs in these actions, have alleged that Credit
9 Suisse aggressively marketed and sold NCFE notes, encouraged NCFE to issue additional
10 notes, and provided critical support needed to conceal the ongoing wrongdoing from
11 investors, despite the fact that Credit Suisse knew (and/or should have known) key aspects of
12 the NCFE fraud. In denying Credit Suisse's motion for summary judgment, the presiding
13 district judge in the now-concluded MDL proceeding found that plaintiffs "have submitted
14 clear and convincing evidence from which a jury could reasonably conclude that Credit Suisse
15 knew or should have known of the material aspects of National Century's fraud." [See MDL-
16 Doc 1846 at 35.]

17 **2. PROCEDURAL BACKGROUND.**

18 The three related actions that are the subject of this motion were filed in Arizona state
19 court and removed to the District of Arizona in 2003. Later that year, the cases were
20 transferred to the United States District Court for the Southern District of Ohio (the
21 "Southern District of Ohio") (the district in which NCFE did business) by the Judicial Panel
22 on Multi-District Litigation for consolidated pre-trial proceedings before the Hon. James L.
23 Graham, then chief judge of that district. From 2003 to 2012, Judge Graham oversaw pretrial
24 motion practice and discovery, while at the same time supervising the NCFE bankruptcy
25 proceeding also pending in the Southern District of Ohio.
26

27 In the course of the consolidated pre-trial proceedings before Judge Graham: (i)
28 motions to dismiss were briefed and decided; (ii) extensive discovery was conducted,

1 including hundreds of depositions and the exchange of millions of pages of documents; (iii)
2 expert disclosures and discovery were completed; and (iv) motions for summary judgment
3 were briefed and decided. As explained in the Amended Pretrial Order entered by Judge
4 Graham prior to the transfer to this Court, the three related actions that are the subject of this
5 motion are ready for trial. [See MDL-Doc 1864 at 1-5.]

6 **3. ARGUMENTS AND AUTHORITIES REGARDING CONSOLIDATION.**

7 Federal Rule of Civil Procedure 42(a) provides that two or more actions may be
8 consolidated if they “involve a common question of law or fact.” Fed. R. Civ. P. 42(a). Local
9 Rule 42.1(a) further provides that a party may move to transfer two or more different cases to
10 a single judge when the party believes that the cases
11

12 (1) arise from substantially the same transaction or event; (2) involve
13 substantially the same parties or property; (3) involve the same patent,
14 trademark, or copyright; (4) call for determination of substantially the same
15 questions of law; or (5) for any other reason would entail substantial
16 duplication of labor if heard by different Judges.

17 Consolidation is left to the “broad discretion” of the district courts. *Borenstein v. The Finova*
18 *Group, Inc.*, No. Civ. 00-619-PHXSMM, 2000 WL34524743, *3 (D. Ariz. Aug. 30, 2000) (citing
19 *Investors Research Co. v. U.S. Dist. Court*, 877 F.2d 777, 777 (9th Cir. 1989)).

20 Each of the relevant factors is satisfied here. All three cases arise from the same
21 transactions and events: Credit Suisse’s participation in the massive fraud at NCFE. All three
22 cases involve substantially the same parties: investors in the NCFE notes as plaintiffs, and
23 Credit Suisse and the NCFE founders (Lance Poulsen, Donald Ayers, and Rebecca Parrett) as
24 defendants. All three cases implicate the same questions of law: whether Credit Suisse and
25 the NCFE founders conspired to defraud investors in NCFE notes. Indeed, the complaints
26 in all three cases are virtually identical. [Compare MDL-Doc 686 (Second Am. Compl. in the
27 case at bar) with MDL-Doc 685 (Second Am. Compl. in the State of Arizona Action) and
28 MDL-Doc 687 (First Am. Compl. in the Crown Cork Action).] See *Cwiak v. City of Phoenix*,

1 No. CV 09-1858-PHX-MHM, 2010 WL 1742531, at *1 (D. Ariz. Apr. 29, 2010) (granting
2 motion to consolidate where “the complaints in each of these two cases are nearly identical”);
3 *Borenstein*, 2000 WL 34524743, at *3 (ordering consolidation because “the complaints in all
4 four of these actions are essentially identical”). And as described above, all three cases are in
5 the same procedural posture. Thus, the cases are in similar stages of litigation and
6 consolidation will not delay the processing of the cases or lead to confusion or prejudice in
7 the effective case management of the actions.

8 This Court also is the proper forum for consolidation. Local Rule 42.1(d) provides
9 that a court should consider four factors when determining the judge before whom cases
10 should be consolidated: “(1) whether substantive matters have been considered in a case; (2)
11 which Judge has the most familiarity with the issues involved in the cases; (3) whether a case
12 is reasonably viewed as the lead or principal case; or (4) any other factor serving the interest
13 of judicial economy.”

14 Transfer and consolidation of the State of Arizona Action and Crown Cork Action to
15 this Court is appropriate. Although there has been no significant activity or substantive
16 consideration in any of the three cases by any court in the District of Arizona, the case at bar
17 is the one in which the first largely substantive complaint was filed. In addition, by providing
18 that motions to transfer and consolidate shall be heard in the court with the lowest case
19 number, *see* LRCiv 42.1(a) and (b), this Court’s Local Rules indicate a preference, all other
20 things being equal, for transfer to and consolidation before this Court, the court with the
21 lowest assigned case number. *See Hall v. Medicis Pharm. Corp.*, No. CV-08-1821-PHX-GMS,
22 2009 WL 648626, at *2 (D. Ariz. Mar. 11, 2009) (assigning the consolidated case to itself and
23 concluding the court was “most familiar with the issues” simply because it had considered the
24 motion to transfer and was assigned the case that was filed first).

25
26 **4. CONCLUSION.**

27 For all the foregoing reasons, Plaintiffs respectfully request that this Court transfer the
28

1 State of Arizona Action and the Crown Cork Action to this Court and consolidate the three
2 cases in accordance with the attached proposed order. Plaintiffs also respectfully request that
3 this Court set the consolidated action for trial at the earliest possible date.
4

5 DATED this 21st day of May, 2012

6 **GIBBS & BRUNS, L.L.P.**

7 Kathy D. Patrick
8 Robert J. Madden
9 Scott A. Humphries
10 1100 Louisiana, Suite 5300
11 Houston, Texas 77002
12 Counsel for Plaintiffs

13 **COHEN KENNEDY DOWD & QUIGLEY, P.C.**

14 The Camelback Esplanade I
15 2425 E. Camelback Road, Suite 1100
16 Phoenix, Arizona 85016
17 Local Counsel for Plaintiffs

18 By /s/ Daniel P. Quigley
19

20 Ronald Jay Cohen
21 Daniel P. Quigley
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, I electronically submitted the foregoing **PLAINTIFFS' MOTION TO TRANSFER AND CONSOLIDATE** to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants in this matter.

/s/ *Daniel P. Quigley*

Chen Kennedy Dowd & Quigley